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SAS INDUSTRIES SDN BHD & ANOR v. PERBADANAN KEMAJUAN NEGERI SELANGOR

HIGH COURT MALAYA, SHAH ALAM
MOHD FIRUZ JAFFRIL J
[CIVIL SUIT NO: BA-22NCVC-500-11-2019]
30 OCTOBER 2023

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Abstract – *The doctrine in Rylands v. Fletcher requires a plaintiff to establish the following ingredients: (a) that the defendant had collected and kept on his land a 'thing' that was likely to do mischief; (b) that the manner in which the 'thing' was put to use was non-natural; (c) that the 'thing' escaped as a consequence of an act of vis major or an act of God; and (d) the defendant could have reasonably foreseen the consequences of the 'thing' causing damage to the plaintiff if it escapes; and (ii) The court may dismiss a claim if such claim arises from the claimant's illegal activity.*

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TORT: *Negligence – Damages – Claim for – Claim by company against agency of State Government – Agency carried out works on project where water kept in pond – Water kept under control by way of silt traps – Water flooded into claimants' factory premises, causing extensive damage to claimants' premises and properties – Whether there was extraordinary rainfall on day of incident – Whether agency negligent in constructing and maintaining silt traps – Whether doctrine of Rylands v. Fletcher applicable – Whether claimants' premises and business operations tainted with illegality – Whether maxim 'ex turpi causa non oritur actio' applied*

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LOCAL GOVERNMENT: *State Government – Agency of State Government – Tort – Claim by company against agency of State Government – Agency carried out works on project where water kept in pond – Water kept under control by way of silt traps – Water flooded into claimants' factory premises, causing extensive damage to claimants' premises and properties – Whether there was extraordinary rainfall on day of incident – Whether agency negligent in constructing and maintaining silt traps – Whether doctrine of Rylands v. Fletcher applicable – Whether claimants' premises and business operations tainted with illegality – Whether maxim 'ex turpi causa non oritur actio' applied*

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The first and second plaintiffs were family-owned companies in the business of processing rubber gloves, disinfecting, packing and trading, having their premises at a rented factory ('plaintiffs' premises'). The defendant was an agency and was the development arm of the Selangor State Government. The defendant was carrying out works on a project ('defendant's project') where water was kept by the defendant in a pond by building walls in order to keep the water under control by way of silt traps. On the morning of 18 November

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2016, the plaintiffs' premises were inundated with water, silt, debris and mud from the silt trap constructed and erected at the defendant's construction site. The flow and mud water rose rapidly to about four feet, causing extensive damage to the plaintiffs' premises and properties. Hence, the present claim where the plaintiffs contended that: (i) they suffered various losses and damages due to the flood. This resulted in them having to move out of the factory premises due to the extensive damages to the building, office, equipment, machineries, furniture, fittings and vehicles and losses of stocks and business and goodwill; (ii) the losses they suffered were directly attributable to the gross negligence, wilful neglect and careless regard to the safety and well-being of their neighbours; (iii) in the alternative, the defendant was strictly liable to their neighbours, including the plaintiffs, as not to cause any harm or losses; (iv) the defendant did not maintain the silt trap and ponds. This was fortified by the Majlis Daerah Hulu Selangor ('MDHS') officers, who inspected the defendant's site about 20 days after the flood incident and found that the silt traps were not maintained satisfactorily. The defendant submitted that: (i) the incident of overflowing water that allegedly entered the plaintiffs' premises was due to unusually heavy rain on 18 November 2016 and it was a situation beyond the defendant's control as it was an 'act of God'; (ii) the design of the silt trap had been approved according to the specifications and estimates set by the Jabatan Kerja Raya; (iii) the principle of the *Rylands v. Fletcher* case did not apply in favour of the plaintiffs; and (iv) the operation of the factory or business at the plaintiffs' premises was carried out by the plaintiffs without obtaining the permission, licence and approval of the local authorities, especially from the MDHS. As a result, the plaintiffs' premises did not have a drain and did not have adequate and appropriate drainage system to remove the rainwater that fell on 18 November 2016. The issues that arose were: (i) whether there was extraordinary rainfall on 18 November 2016 at the defendant's site; (ii) whether the defendant was negligent in constructing and maintaining the silt traps; (iii) whether the doctrine of *Rylands v. Fletcher* was applicable to the present case; and (iv) whether the plaintiffs' premises and business operations were tainted with illegality.

Held (dismissing claim):

(1) It was incumbent upon the court to evaluate as to which of the two reports, *ie*, the Meteorological Department's ('MD') report or the Jabatan Pengairan dan Saliran ('JPS') report was more accurate. SP2, who was from the MD, testified that based on the MD's records, there was no rain at the location of the defendant's project. However, comparing the distance between the MD's data collection centre and the JPS data collection to the defendant's project site, based on the best evidence rule, the court was inclined to prefer the JPS report that there was heavy rain at the site on 18 November 2016. (para 14)

(2) The fact that the defendant's silt traps withstood such a heavy rainfall of 104mm on 11 June 2016 showed that the silt traps were constructed in a proper manner and according to the standards set by the authorities. Even though there was outflow of water from the silt traps at the defendant's project, this could not be equated with a finding that there was a failure by the defendant or its contractors to maintain the silt traps satisfactorily. The plaintiffs' witnesses had not given evidence that the outflow of the water from the silt traps was due to the failure to maintain the silt traps satisfactorily. (para 14)

(3) The act of the defendant in building the silt traps to trap surface water, mud and sediment was not based on the defendant's whims and fancy. It was pursuant to a directive by the local authorities which had legal force. This was not a situation where the defendant had collected and kept on his land surface water, mud and sediment in the silt traps for their own purpose. Further, the manner in which the silt traps were built did not involve a non-natural use of the land as the silt traps were built for the benefit of all parties and the public. The defendant had not artificially introduced on to the land a potentially dangerous substance which was harmful to others. There was also no evidence that the method employed by the defendant in constructing the silt traps was unusual and not in accordance with the directives or specifications of the local authorities. The defendant could not be blamed for the overflow of the silt traps due to the extraordinary rainfall on 18 November 2016. In the circumstances, the doctrine of *Rylands v. Fletcher* was not applicable to the case at hand. (para 14)

(4) There was no evidence of approval from the local authorities for the factory to be built on the land concerned. The plaintiffs were also not equipped with the requisite licence to operate the factory business. Under s. 70 of the Streets, Drainage and Buildings Act 1974, no building shall be erected without the approval of the local authorities. Under s. 30 of the Industrial Co-ordination Act 1975, no person shall engage in any manufacturing activity without a licence being issued for such manufacturing activity. In so far as the district of Hulu Langat where the plaintiffs' premises was located, s. 3 of the Undang-undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Hulu Langat) 2007 prohibits the carrying out of any trade activities, business and industry or the use of any premise to conduct such without a licence. The maxim '*ex turpi causa non oritur actio*' (no action can arise from an illegal action) applied squarely against the plaintiffs herein. It was obvious that the plaintiffs, who previously had little regard for the law in the conduct of their business affairs, was now coming to the court to seek remedy in the law that they previously disregarded. Such behaviour should be discouraged and could not be condoned. (para 14)

Case(s) referred to:

Abdul Aziz Awang & Ors v. Tenaga Nasional Bhd [2018] CLJU 954; [2018] 1 LNS 954 HC ***(refd)***

Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix And Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government Of Malaysia & Anor [1994] 1 CLJ 321 SC ***(refd)***

Glove Kendall Limited & Anor v. Maple Challenge Sdn Bhd & Ors And Other Cases [2016] CLJU 1642; [2016] 1 LNS 1642 HC ***(refd)***

Golden Wheel Credit Sdn Bhd v. Dato' Siah Teong Din [2021] 9 CLJ 461 HC ***(refd)***

Hiap Lee (Cheong Leong And Sons) Brickmakers Ltd v. Weng Lok Mining Company Ltd [1974] 2 MLJ 1 ***(refd)***

Muhammad Saleh Hashim & Ors v. Percon Corp Sdn Bhd [2003] CLJU 756; [2003] 1 LNS 756 HC ***(refd)***

National Coal Board v. England (1954) AC 403 ***(refd)***

Ooi Han Sun & Anor v. Bee Hua Meng [1991] CLJU 110; [1991] 1 LNS 110 HC ***(refd)***

Pang Mun Chung & Anor v. Cheong Huey Charn [2018] 8 CLJ 663 CA ***(refd)***

Parkingeye Ltd v. Somerfield Stores Ltd (2013) 2 WLR 939 ***(refd)***

Patel v. Mirza (2016) UKSC 42 ***(refd)***

Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***

Rickards v. Lothian [1913] AC 263 ***(refd)***

Rylands v. Fletcher (168) LR 3 HL 330 ***(dist)***

Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(refd)***

Subramaniam v. PP [1956] CLJU 115; [1956] 1 LNS 115 PC ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:

Federal Constitution, art. 5

Industrial Co-ordination Act 1975, s. 3

Street, Drainage and Building Act 1974, s. 70

Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Hulu Langat) 2007, s. 3

For the plaintiffs - M/s Manogar & Co

For the defendant - M/s Lainah Yaacob & Zulkepli

Reported by Lina E

JUDGMENT

Mohd Firuz Jaffril J:

[1] The following is the court's decision at the end of a full trial between the parties. The trial commenced on 11 August 2022 and concluded on 28 March 2023. In total, there were 12 witnesses called, five by the plaintiffs and seven by the defendant.

[2] Having gone through the pleadings of all parties, the evidence adduced at the trial, both oral and documentary, and upon reviewing the submissions of counsel, this court had on 24 August 2023 dismissed the plaintiff's claim.

[3] Dissatisfied with the above decision, the plaintiffs have since lodged an appeal against the above decision by way of a notice of appeal dated 22 September 2023 to the Court of Appeal. The following are my grounds of judgment in relation to the said appeal.

Factual Matrix Of The Plaintiffs' Claim

[4] The first and second plaintiffs are family-owned companies, where the directors and shareholders are all from one family. The companies are in the business of processing of rubber gloves, disinfecting, packing and trading, having their rented factory premises located on Lot 74C, Batu 27, Jalan Besar KL-Ipoh, 48200 Serendah, Selangor ('the plaintiffs' premises').

[5] The defendant is a Selangor State Government agency and is the development arm of the Selangor State Government, involved in various mixed developments mostly on land owned by them or the State Government.

[6] *Circa* 2016, the defendant was at all material times, through its servants, agents, contractors or workers was, carrying out works on a project known as "Proposed completion of infrastructure works for part of Persiaran Gapi 2 and part of Jalan Antara Gapi 2 in Antara Gapi, Bandar Sungai Chik, Daerah Hulu Selangor ('the defendant's project')". Water was kept by the defendant in a pond by building walls to keep the water under control by way of silt traps.

[7] On the morning of 18 November 2016 at around 10.30am ('the material time'), the plaintiffs' premises were inundated with water, silt, debris and mud from the silt trap constructed and erected at the defendant's construction site.

[8] At the material time, the plaintiffs' premises were in full operation, with about 30 of the plaintiffs' staffs and workers doing their respective jobs. The sudden flow of water, silt and mud from the defendant's construction site into the said plaintiffs' factory, did not permit the plaintiffs time to save or remove their stocks, including finished products, machineries, equipment, vehicles and other office/plant accessories and furnishings.

[9] The flow water and mud water rose rapidly to about four feet, caused extensive damage to the plaintiffs' premises and properties.

Summary Of The Plaintiffs' Pleaded Case

[10] It is the plaintiffs' pleaded case that:

(i) they suffered various losses and damages due to the flood. This resulted in them having to move out of the factory premises due to the extensive damage to the building, damage to office equipment, machinery, furniture and fittings, vehicle, loss of stocks and loss of business and goodwill;

(ii) the losses suffered are directly attributable to the gross negligence, willful neglect and careless regard to the safety and well-being of their neighbours;

(iii) further and or in the alternative, the defendant is strictly liable to their neighbours, including the plaintiffs, as not to cause any harm or losses;

(iv) the defendant did not maintain the silt trap and ponds constructed by itself, servants or agents and this led to the ponds containing vast amounts of water that burst the walls due to improper or no maintenance of the silt traps;

(v) the defendant knew or ought to have known that if the silt traps are not maintained, it will cause the water, silt and mud to escape or flow out and that will cause destruction to the neighbours including the plaintiffs;

(vi) the silt trap and pond operated by the defendant was for the defendant's own use or operated for and on behalf of the defendant by its servants, agents, contractors and workers in carrying out the said project works for the defendant as the owner and developer of the said project works;

(vii) the silt trap/pond built and created by the defendant is for their own use to carry out their works for the purposes of the said project works by the defendant and the accumulation of water into the pond was for a non-natural use for the defendant's own purposes. The defendant had full control of the operations and maintenance of the silt trap and pond as the owner;

(viii) the plaintiffs' claim against the defendant is fortified by the Majlis Daerah Hulu Selangor ('MDHS') officers, who inspected the defendant's site on 8 December 2016 *ie*, about 20 days after the flood incident. During this inspection, MDHS officers found that the silt traps were not maintained satisfactorily (see p. 54 of bundle B1).

Summary Of The Defendant's Case

[11] The defendant's case can be summarised as follows:

(i) the defendant has appointed Kumpulan Jurutera Perunding ('KJP') to design the infrastructure system for the construction of roads and ditches for the "Cadangan penyelesaian kerja-kerja infrastruktur untuk sebahagian Persiaran Antara Gapi, Bandar Sungai Chik, Daerah Hulu Selangor" ('the project');

(ii) KJP has applied for and received approval from the Jabatan Pengairan dan Saliran Daerah Hulu Selangor for the ground work plan and for roads and drains through a letter dated 13 November 2014. The

A defendant has also obtained the kelulusan pelan kerja tanah from the MDHS through a letter dated 23 March 2015 and the kelulusan pelan jalan dan parit from the MDHS dated 4 March 2015;

(iii) the defendant has been subject to conditions by the Jabatan Pengairan dan Saliran Daerah Hulu Selangor through a letter of permission dated 13 November 2014 to build a pond and silt trap to be built in the project. MDHS agreed that the water should be drained out through the existing natural stream system. The design of the 'silt trap' has been approved according to the specifications and estimates set by the Jabatan Kerja Raya Malaysia ('JKR');

(iv) for the civil works at the project site, the defendant has appointed the company, Eminent Ventures Sdn Bhd ('the contractor'), to carry out the works at the project site, which has been appointed through a tender bid and confirmed through a construction agreement on 11 August 2015 between the defendant and the contractor. The contractor is required to build three 'silt traps' according to the specifications and conditions set by MDHS and Jabatan Pengairan dan Saliran Hulu Selangor;

(v) the incident of overflowing water that allegedly entered the plaintiffs' premises was due to unusually heavy rain and recorded rainfall at the Stesen Ladang Sg Gapi and it was a situation beyond the defendant's control and was an "act of god";

(vi) the defendant states that if there is any rubber glove handling and packaging activity by the plaintiffs, the defendant claims that the operation of the factory or business at the premises is carried out by the plaintiffs without obtaining the permission, license and approval of the local authorities, especially from the MDHS;

(vii) as a result of the operation of the plaintiffs without the approval of the MDHS, the premises building built by the landlord does not have a drain and does not have an adequate and appropriate drainage system to remove the rainwater that fell on 18 November 2016 at Stesen Ladang Sg Gapi;

(viii) the defendant denied the principle of the case of *Ryland v. Fletcher* applied in favour of the plaintiffs because the 'silt trap' had been built as directed by the relevant authorities and local authorities;

(ix) the plaintiffs otherwise conduct business operations at the premises without a license and the plaintiffs even store rubber glove products as legal deposits at the premises without a license;

(x) the plaintiffs cannot rely on the principle of "*res ipsa loquitor*" on the facts that have been filed by the defendant, who has complied with the conditions of the local authorities with the construction of the 'silt trap' and the overflow of water that occurred on 18 November 2016 was due to unusually heavy rain on the said date.

Issues To Be Tried

[12] For purposes of the trial, the parties herein had listed the following 14 issues to be tried:

(i) whether the defendant is liable for the works carried out by the contractor, Eminent Ventures Sdn Bhd ('EVSB');

(ii) whether the contractor EVSB is an independent contractor wherein the defendant is not liable for the works carried out by the said contractor;

(iii) whether the defendant is liable for the works carried out by the independent contractor for the said floods;

(iv) was the silt trap and water pond involved in this case constructed and maintained according to the specifications by the local authority;

(v) was the flood incident in the plaintiffs' factory premises on 18 November 2016 caused by extraordinary rainfall at the said location;

(vi) in the circumstance, where the said flood was caused by extraordinary rainfall, was that an "act of God" beyond the control of the defendant;

(vii) in the circumstance, where the said flood was caused by an "act of God", is the defendant liable for the losses and damages alleged to have suffered by the plaintiffs as a result of the said flood;

(viii) whether the real cause of the flood at the plaintiffs' premises on 18 November 2016 was due to extraordinary rainfall or the failure of the defendant, the defendant's contractor, to maintain the pond/silt trap satisfactorily;

(ix) whether the plaintiffs were operating the factory premises without the approval of the authorities in contravention of the law;

(x) in the circumstance, where the plaintiffs were occupying the factory premises without the approval of the local authority, is the defendant liable for all the losses suffered by the plaintiffs as a result of the said flood on 18 November 2016;

(xi) in the circumstance, where the plaintiffs were occupying the factory premises that was not constructed in accordance with the law and operating without valid approval, have the plaintiffs a valid cause of action against the defendant liable for all the losses suffered by the plaintiffs as a result of the said flood on 18 November 2016;

A (xii) is the doctrine of *Rylands v. Fletcher* applicable in this case;

(xiii) is the principle of '*res ipsa loquitor*' applicable in this case; and

(xiv) in the event the defendant is liable to the plaintiffs for the said flood on 18 November 2016, what is the quantum of damages payable by
B the defendant to the plaintiffs.

Court's Findings And Analysis

[13] Despite the long list of issues to be tried formulated by both parties, I took the view that the case at hand only requires me to consider four issues only, namely:
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(i) whether there was extraordinary rainfall on 18 November 2016 at the defendant's site?

(ii) whether the defendant was negligent in constructing and maintaining the silt traps?
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(iii) whether the doctrine in *Rylands v. Fletcher* is applicable to the present case? and

(iv) whether the plaintiffs' premises and business operations are tainted with illegality?
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[14] My analysis of the above issues is as follows:

(i) whether there was extraordinary rainfall on 18 November 2016 at the defendant's site?

(a) on this issue, the plaintiffs contended that there was no rainfall on
F 18 November 2016. In support of this contention, the plaintiffs relies on the testimony of Puan Norshahrizan binti Darus (SP2) from the Malaysia Meteorological Department;

(b) it was SP2's testimony that based on the records of her Department, there was no rain at the location of the defendant's project on
G 18 November 2016;

(c) when SP2 was asked to compare the Department's report at exh. B5 to the report prepared by Jabatan Pengairan Dan Saliran ('JPS') at bundle B1 p. 278, SP2 said that the latter was inaccurate as it does not state the longitude and latitude of the data collection centre
H relied by the defendant;

(d) the plaintiffs also contended that the JPS report showed that the rainfall at the location on 18 November 2016 was 86.5mm. The same report also shows that the rainfall at the same location on
I 11 June 2016 was 104mm. This is much higher than 86.5mm. Despite this huge difference, there was no flood at the plaintiffs' premises on 11 June 2016. This shows that the JPS report is not true or inaccurate.

(e) in this regard, it is incumbent on this court to evaluate as to which of the two reports *ie*, the Meteorological Department's report (exh. B5) or the JPS report is more accurate.

(f) it has to be noted that the exh. B5 report is based on the data collected at Pusat Pertanian Batang Kali, which is situated ten kilometres away from the defendant's project site (this was confirmed by SP2). The JPS report, on the other hand, is based on data collected at the Ladang Antara Gapi Station, which is located 1.3 kilometres from the same site. Contrary to the plaintiffs' contention that the JPS report suffers from the defect of not having the longitude and latitude details of the JPS data collection centre, such details can be found at p. 284 of bundle B1.

(g) comparing the distance between the Meteorological Department data collection centre and the JPS data collection to the defendant's project site, based on the 'best evidence rule', this court is inclined to prefer the JPS report that there was heavy rain at the site on 18 November 2016.

(g) this court also disagrees with the plaintiffs' contention that the JPS report is inaccurate as the recorded rainfall of 104mm on 11 June 2016 did not cause any flooding to the plaintiffs' premises. This is purely conjecture. In any event, this court cannot place too much emphasis on what transpired on 11 June 2016, as the live issue in the present case is whether there was a heavy rainfall on 18 November 2016 and not five months earlier.

(h) to my mind, the fact that the defendant's silt traps withstood such a heavy rainfall of 104mm on 11 June 2016, shows that the silt traps were constructed in a proper manner and according to standards set by the authorities.

(ii) whether the defendant was negligent in constructing and maintaining the silt traps?

(a) at para. 25 of the statement of claim, the plaintiffs alleged that the defendant was negligent in maintaining the silt traps built for its project.

(1) in support of this allegation, the plaintiffs relied on the testimony of SP1, SP2, SP4, SD2 and SD3.

(2) SP1 testified that the defendant received information that on the date in question, there was continuous rain resulting in water flowing at a high quantity, causing spillage from the silt trap and the surrounding area prepared by the contractor.

(3) SP2 testified that on 18 November 2016, there was no record of rain in the area of Stesen Pusat Pertanian Batang Kali. At the time of checking, the distance from Stesen Pusat Pertanian Batang Kali and the location in dispute is about ten kilometres.

(4) SP4 then testified that, based on their investigations, the flooding incident was caused by the failure of the silt traps. In fact, the MDHS had, on 15 March 2017, issued a notice of breach to the defendant's contractors for failure to maintain the silt traps satisfactorily. This was as a result of a site visit by MDHS officials on 8 December 2016.

(5) the witnesses for the defendant *ie*, SD2 and SD3 also testified that the huge rainfall caused water outflow from the silt trap.

(6) based on the above, the plaintiffs contended that there is an irresistible conclusion that the silt traps were malfunctioning.

(7) in evaluating this issue, this court agrees with the plaintiffs that there was an outflow of water from the silt traps at the defendant's project. This, however, cannot be equated with a finding that there was a failure by the defendant or its contractors to maintain the silt traps satisfactorily.

(8) having reviewed the testimony of both SP1 and SP2, I found that both these witnesses had not given evidence that the outflow of the water from the silt traps was due to the failure to maintain the silt traps satisfactorily.

(9) with reference to the testimony of SP4, the site visit on 8 December 2016 and the MDHS notice, this court takes cognisance of the fact that SP4 did not visit the project site on 8 December 2016. In fact, SP4 had no knowledge of the flooding incident.

(10) this court also takes cognisance of the fact that the report relied upon by SP4 was prepared by one, Encik Alfian, who in turn reported the matter to one, Encik Azhar and not to SP4 (see pp. 93 and 94 of the notes of proceedings).

(11) contrary to the plaintiffs' contention that the MDHS notice was issued after the site visit on 8 December 2016, it was in fact issued after a site visit by Encik Alfian on 2 March 2017. Encik Alfian was not called as a witness.

(12) in light of the fact that SP4 did not conduct the site visit on 8 December 2016 nor 2 March 2017, this court finds that the truth of the contents of the notices *ie*, that the defendant's

contractors had failed to maintain the silt traps satisfactorily cannot be established (see *Subramaniam v. PP* [1956] CLJU 115; [1956] 1 LNS 115; [1956] 1 MLJ 220).

(13) based on my calculations, the site visits on 8 December 2016 and 2 March 2017 were approximately 21 days and 104 days, respectively, from the date of the incident. This delay is unsatisfactory for the purposes of proving that the silt traps were maintained unsatisfactorily at the time of the incident. *Ipso facto*, I take the view that the evidence adduced by the plaintiffs in support of this issue is wanting.

(iii) whether the doctrine in *Rylands v. Fletcher* is applicable to the present case?

(a) the plaintiffs, in their statement of claim, have prayed in addition and/or in the alternative that the defendant is liable under the *Rylands v. Fletcher* doctrine of strict liability.

(1) it is the plaintiffs' pleaded case that the defendant did not manage properly the water that they collected and kept on their premises. This led to water, silt, debris and mud escaping from the defendant's project site and caused loss and damage to the plaintiffs' property. As the water kept was of a non-natural use, the defendant is strictly liable to the plaintiffs without need for the plaintiffs to prove negligence on the part of the defendant (reliance placed on the case of *Abdul Aziz Awang & Ors v. Tenaga Nasional Bhd* [2018] CLJU 954; [2018] 1 LNS 954; [2018] MLJU 908).

(2) at this juncture, perhaps it would be timely for me to state in brief the facts in *Rylands v. Fletcher* (1868) LR 3 HL 330 and the principle propounded by Blackburn J in his judgment:

[116] The facts in *Rylands v. Fletcher* may be stated as follows. There, the defendant had employed contractors to build a reservoir on his land to supply water for his factory. The contractors negligently failed to block a disused mineshaft and when the reservoir was filled to the brim, the plaintiff's adjoining mine was flooded. At first instance, Blackburn J in his judgment, in the Court of Exchequer Chamber, aptly said:

We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; an if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act

> *of God*; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkal works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his own neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.
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> (emphasis adeed)

(3) the above decision was affirmed by the House of Lords subject to the additional requirement that the defendant's use of his land should be non-natural (see *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958; [2013] 5 MLJ 360).

(4) the applicability of the doctrine in *Rylands v. Fletcher* requires a plaintiff to prove the following ingredients:

(i) that the defendant had collected and kept on his land a 'thing' that was likely to do mischief;

(ii) that the manner in which the 'thing' is put to use was non-natural;

(iii) that the 'thing' escaped as a consequence of an act of *vis* major or an act of God; and

(iv) that the defendant could have reasonably foreseen the consequences of the 'thing' causing damage to the plaintiff if it escapes.

(5) in so far as the facts of the present case are concerned, the silt traps located on defendant's project site was built pursuant to a legal directive by the JPS and MDHS (see pp. 253 to 254 and 256 to 259 of bundle B1) for the purpose of trapping the flow of rain water on the earth surface together with mud and sediment in order to prevent the same to flow thru natural waterways such as natural streams and low land areas.

(6) according to SD4, the silt traps were designed based on the requirements under the Urban Storm Water Management Manual of Malaysia Chapter 12. It was then constructed in accordance and as per the conditions set by both JPS and MDHS (see pp. 253 to 254 and 256 to 259 of bundle B1).

(7) this court is of the view that the act of the defendant in building the silt traps to trap surface water, mud and sediment was not based on the defendant's whims and fancy. It was pursuant to a directive by the local authorities, which has legal force. This is not a situation where the defendant had collected and kept on his land surface water, mud and sediment in the silt traps for their own purpose. Hence, the first ingredient in *Rylands v. Fletcher* is not present.

(8) this court also agrees with the defendant's following submissions:

(i) that the manner in which the silt traps were built, did not involve a non-natural use of the land as the silt traps were built for the benefit of all parties and the public;

(ii) that the defendant had not artificially introduced onto the land a potentially dangerous substance which was harmful to others;

(iii) that there is no evidence that the method employed by the defendant in constructing the silt traps was unusual and not in accordance with the directives or specifications of the local authorities; and

(iv) that the defendant cannot be blamed for the overflow of the silt traps due to the extraordinary rainfall on 18 November 2016.

See:

(a) *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508; [2000] 4 MLJ 200;

(b) *Hiap Lee (Cheong Leong And Sons) Brickmakers Ltd v. Weng Lok Mining Company Ltd* [1974] 2 MLJ 1; and

(c) *Rickards v. Lothian* [1913] AC 263.

A (9) what the above analysis means is that the second ingredient in *Rylands v. Fletcher* has also not been met. In the above circumstances, it is this court's considered view that the doctrine of *Rylands v. Fletcher* is not applicable to the case at hand.

B (iv) whether the plaintiffs' premises and business operations are tainted with illegality?

(a) it is an undisputed fact that the premise concerned was rented by the first plaintiff from one, Goo Hung Hing, by way of a tenancy agreement dated 1 June 2014.

C (1) the second plaintiff was a subtenant of the first plaintiff (there is no evidence that the second plaintiff's occupation to the premise was consented to by the landlord as required under the tenancy agreement).

D (2) it is also an undisputed fact that there was no evidence of approval from the local authorities for the factory to be built on the land concerned and that the plaintiffs are not in equipped with the requisite license to operate the factory business.

E (3) under s. 70 of the Street, Drainage and Building Act 1974, no building shall be erected without the approval of the local authorities.

(4) under s. 3 of the Industrial Co-ordination Act 1975, no person shall engage in any manufacturing activity without a license being issued for such manufacturing activity.

F (5) in so far as the District of Hulu Langat, where the plaintiffs' premise is located, s. 3 of the Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Hulu Langat) 2007 prohibits the carrying out of any trade activities, business and industry or the use of any premise to conduct such G without a license.

(6) the defendant contends that the conduct of the plaintiffs in carrying on its business on the premise that was built without approval from the local authorities and without the requisite licenses to operate is deemed as 'an illegal act' which is contrary H to public policy. In such circumstances, the plaintiffs cannot be allowed to maintain an action in tort for matters related to their occupation and business on the premises.

(7) the plaintiffs disagree with the defendant's proposition that they are caught by illegality. For this purpose, the plaintiffs I submitted as follows:

(i) they may have operated the factory irregularly, not illegally; A

(ii) the factory was not operating undercover. This is evident from the fact that MDHS had issued the assessment bill for the premises under the category of 'sebuah kilang' or factory. Surely, before categorising the premise as a factory premise, the said building must have been properly built to be issued with an assessment bill; B

(iii) the issue of operating the factory without a license is a matter between the plaintiffs and MDHS. As it stands, MDHS has never issued any sum to the plaintiffs to close the factory; C

(iv) non-compliance of the licensing and business by-laws attracts no penal punishments and cannot be said to be a breach of the statute;

(v) in so far as the provisions of the Street, Drainage and Building Act 1974, there is no evidence that the plaintiffs' factory premises were illegally built or a squatter; D

(vi) the statutory provisions relied by the defendant cannot be used to defeat the plaintiffs' claim as losses caused by the defendant are disproportionate to the offence of operating without a license, especially when it is in the evidence that MDHS knew of the plaintiffs' factory operations but did not take the necessary actions (reliance based on *Patel v. Mirza* (2016) UKSC 42; *Parkingeye Ltd v. Somerfield Stores Ltd* (2013) 2 WLR 939; *National Coal Board v. England* (1954) AC 403; *Pang Mun Chung & Anor v. Cheong Huey Charn* [2018] 8 CLJ 663; [2018] 4 MLJ 594; *Golden Wheel Credit Sdn Bhd v. Dato' Siah Teong Din* [2021] 9 CLJ 461; [2021] 12 MLJ 589 and *Ooi Han Sun & Anor v. Bee Hua Meng* [1991] CLJU 110; [1991] 1 LNS 110; [1991] 3 MLJ 219); E F

(vii) the Supreme Court in *Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix And Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government Of Malaysia & Anor* [1994] 1 CLJ 321; [1994] 1 MLJ 394, allowed a claim in tort even though the plaintiff there did not have a taxi permit. The Supreme Court then proceeded to allow loss of income from legal earnings but did not allow for loss of income from illegal earnings. G H

I

(8) first and foremost, I am compelled to state that the authorities relied upon by the plaintiffs at para. 14(iv)(7) all concerns illegal contracts. They have no applicability to the facts of the present case before this court.

(9) secondly, in so far as the *Chua Kim Suan (Administratix Of The Estate Of Teoh Tek Lee, deceased) & Anor v. Government of Malaysia & Anor* (*supra*), I find no reason to disagree with the above decision. To my mind, the right to earn a living can be equated to the right to life as guaranteed under art. 5 of our Federal Constitution (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771).

(10) thirdly, the right to earn a living is not the same as the right to engage in a commercial business for profit. It is my considered view that all commercial businesses must comply with statutory requirements including the by-laws of the local council. Similarly, all buildings which are to be erected must obtain approval of the authorities before construction can begin. These laws are designed not only to protect the well-being and interest of the public, but also to business owners and dwellers of the building concerns.

(11) based on the facts of the present case, I am constrained to hold that the maxim '*ex turpi causa non oritur actio*' (no action can arise from an illegal action) applies squarely against the plaintiffs herein. It is obvious that the plaintiffs, who previously have little regard for the law in the conduct of their business affairs are now coming to the court to seek remedy in the law that they previously disregarded. Such behaviour should be discouraged and cannot be condoned in line with public policy as stated in *Muhamad Saleh Hashim & Ors v. Percon Corp Sdn Bhd* [2003] CLJU 756; [2003] 1 LNS 756; [2003] 6 MLJ 483:

> (v) But whether a claim brought is founded in contract or in tort, public policy requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts. As Best CJ said in *Adamson v. Jarvis* (1827) 4 Bin 66, 72-73.

(12) even if the defendant did not raise the issue of illegality as done in this case, for, purposes of defeating the plaintiffs' claim, this court can, on its own volition, raise the issue of illegality when the facts of the case warrants so (refer case of *Glove Kendall Limited & Anor v. Maple Challenge Sdn Bhd & Ors And Other Cases* [2016] CLJU 1642; [2016] 1 LNS 1642; [2016] MLJU 1452).

(13) even if I am wrong on to dismiss the plaintiffs' submission on the disproportionality of the losses suffered, I had already formed my conclusion based on the evidence adduced by both parties that the plaintiffs had failed to prove that the failure of the defendant to maintain the silt traps in a satisfactory manner.

Costs

[15] On the issue of costs of the proceedings, I wish to state that this court is not without empathy to the sufferings of the plaintiffs as a result of the flood incident to its factory premise. Nonetheless, my findings are such that it cannot render assistance to the plaintiffs. In such circumstances and without any intention to disrespect the defendant, this court exercises its discretion not to order any costs as against the plaintiffs.